companies that control the broadcast network program marketplace. Thus, five companies are now the gatekeepers and decision makers for the programming choices of the vast majority of American people both on broadcast television and cable networks combined.

None of the studies prepared by the Commission address the tremendous consolidation and danger posed by these changes in the marketplace for independently produced television programming. All of these studies fail to recognize or assess what the data makes abundantly clear: When viewed by any standard, source diversity has almost completely disappeared from the American television scene. In our view, it must be restored.

The Commission has recognized that two key touchstones of the public interest standard applicable in this proceeding are competition and diversity. Source diversity should be a clear component of Commission policy. It is premised on the notion, fundamental to our American democracy, that to assure a functioning marketplace of ideas, multiple speakers are preferred, if not crucial. Source diversity is also content neutral. It does not spring from any judgment of individual programming and does not offend traditional notions of First Amendment protection or raise censorship concerns.

The Commission needs to redress the significant imbalance that has evolved in the marketplace in recent years because of the dramatic mergers of studios and networks. It should adopt measures designed to insure that national program services on broadcast and cable television purchase at least 50% of their prime time programming from independent producers. Such a measure is designed simply to recognize that the Commission has a public interest obligation to protect the interests of the viewing public and to take steps, when those interests are clearly threatened, to redress the imbalance and to insure that the liberty and freedom of choice which are critical to the American experience are steadfastly protected and maintained.

Statement of Interest

The Writers Guild of America, west, represents 8,500 writers who write most of America's films and entertainment television programs (hereafter, "WGA" or "The Guild").

The Producers Guild of America represents over 1,800 members who are engaged in producing programs for television, motion pictures and new media.

Shukovsky English Productions (owned by Joel Shukovsky and Diane English) is a television production company that has produced such programs as "Murphy Brown."

John Wells Productions (owned by John Wells) is a television and motion picture production company that has produced such programs as "ER", "The West Wing", "Third Watch", and "Presidio Med".

Bungalow 78 Entertainment is a television production company (owned by Barry Kemp) that has produced such programs as "Coach", "The Bob Newhart Show", the film "Patch Adams." Mr. Kemp served as Executive Producer on the film "Catch Me if You Can".

Oh Shoot Productions is a production company that has produced television and motion pictures. Its president, Frank Pierson, a writer, director and producer, is currently president of the Academy of Motion Picture Arts and Sciences. Mr. Pierson also directed "Conspiracy" and "Citizen Cohn" for HBO and wrote "Dog Day Afternoon", "Cat Ballou", and "Cool Hand Luke", and other feature films.

Gideon Productions is a television production company that has produced such programs as "Gideon's Trumpet", "Day One", "World War II: When Lions Roared", "The Member of the Wedding", and "The Last Best Year." It's president, David Rintels, also wrote "Sakharov" and produced "NBC Live Theatre: Roses in December" and "My Antonia."

UBU Productions is a television production company (owned by Gary David Goldberg) that has produced such programs as "Family Ties" and "Spin City."

Background

In this proceeding, the Federal Communications Commission undertakes the most massive reexamination of media ownership rules in its history.

Due to simultaneous, multiple technological revolutions, a headlong rush toward consolidation in the media over the course of the past decade, court decisions requiring such a reexamination, and scheduled reappraisals stemming from the mandates of the Telecommunications Act of 1996, such a review is required, necessary, and appropriate.

But a review of such an immense scope, with serious implications for its impact on fundamental American values, should not be undertaken lightly or capriciously. Before it takes any steps to reorder the regulations on media ownership, the FCC should make certain it is looking carefully at the whole media landscape and what the effects of further consolidation might be on the policy goals the FCC has historically sought to advance and which are mandated by law.

State of the Television Program Production Marketplace

There has been a dramatic transformation in the marketplace for independently-produced television programming in the last decade. The end result of this transformation has been a marked reduction of source diversity. The decade since the disappearance of the financial interest and syndication rules has seen a reshuffling of the entertainment industry with the end result that independent entrepreneurs have been all but completely shut out of the program supply process.

We urge the Commission to define the relevant marketplace as the economic marketplace for national program production. Importantly, this market must be viewed not only as an economic market, but also as a marketplace of ideas that vitally supports our national discussion of important political and policy issues. The analysis of the program production market as a marketplace of ideas takes into account that more people may form an opinion on major public issues after seeing an episode of the "Practice" or "NYPD Blue" or "West Wing" than after seeing the evening news.

The general consensus regarding the media market today is that it has developed greater competition in recent years.[1] This is not true in the national program production market. To the contrary, the market has gradually failed. The public airwaves are quickly headed for complete domination by a handful of mega-corporations that are both vertically and horizontally integrated and which serve to limit both diversity and competition.

The following charts present the number of prime time series produced by the six broadcast networks for themselves. The situation has changed dramatically over the last ten years. For series new to the network schedule, the networks have moved from 15% in-house production to 77%.

New Prime Time Series

	1992			2002		
Network	# Of Series From In-House Producers	Total # Of Series On Air	% From In-House Producers	# Of Series From In-House Producers	Total # Of Series On Air	% From In-House Producers
ABC	1	7	14%	6	7	86%
CBS	0	8	----	4	7	57%
NBC	4	9	44%	4	5	80%
FOX	0	9	----	6	7	86%
WB	----	----	----	5	6	83%
UPN	----	----	----	2	3	67%
Total	5	33	15%	27	35	77%

Looking at both new and returning series, the networks have moved from 25% in-house to 69%.

[1] 2002 Biennial Regulatory Review, NPRM, par. 4.

Further, setting aside programs produced by one conglomerate for another, there was only one new series ("Dinotopia" by Hallmark) that was completely independent. Of both new and returning series, only 9 series were completely independent, a number that will decline as independently-produced series end their runs and are replaced by in-house productions.

All Prime Time Series

	1992			2002		
Network	# Of Series From In-House Producers	Total # Of Series On Air	% From In-House Producers	# Of Series From In-House Producers	Total # Of Series On Air	% From In-House Producers
ABC	7	28	25%	15	22	68%
CBS	6	25	24%	20	24	83%
NBC	6	27	22%	12	24	50%
FOX	7	23	30%	17	20	85%
WB	----	----	----	10	17	59%
UPN	----	----	----	7	10	70%
Total	26	103	25%	81	117	69%

This analysis satisfies the Commission's need to determine that the market does not provide a sufficient level of competition in the program production sector to promote the goal of diversity.[2]

This consolidation has a direct and adverse impact on actors, directors, writers, and other creative entrepreneurs in the entertainment industry. They have found their creativity curtailed by networks that hold all the cards in programming. By using their oligopsony power, networks can effectively decide which programs are aired on the public airwaves and which never see the light of day. Since almost all

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[2] 2002 Biennial Review NPRM, par. 31.

of the independent producers once active in the creative community have now been forced to become mere employees of large media empires, they have virtually no power to offer rejected ideas and programs to other networks. With so little ability of artists to act independently, creativity and innovation is not just stifled, it is strangled.

While such anti-competitive conduct certainly harms members of the creative community and their careers, much more is at stake. The fundamental American values of free expression and the competition of ideas, which have been at the core of American democracy since before the revolution, are at risk.

Threatened with extinction in the wave of consolidation that would certainly be unleashed by a further haphazard loosening of media ownership rules are the already endangered values of independent entrepreneurship and open competition. The notion that an independent producer with a creative idea for a new show can with determination and dedication find success and bring his or her creation to the general public is now a chimerical proposition.

While the quantitative data on the consolidation of ownership of networks points to near complete domination of program production by five horizontally and vertically integrated corporations, the Commission proposes to further loosen checks on ownership. The basis for such a further relaxation of the rules is that new technologies that have reshaped the media terrain - most fundamentally cable television - have provided an explosion of options and that "during the past twenty years, the broadcast television industry has faced increasing competition both from additional television stations and form other video delivery systems."[3]

However, the appearance of a diversity of options on cable television separate and apart from broadcast television's domination by a few big players is, in fact, a mirage. While the FCC cites the existence of "230 national cable programming networks,"[4] there are just 91 networks that can be considered "major" networks (defined as available in more than 16 million homes).[5] Of these 91 networks, fully 80 percent (73 networks) are owned or co-owned by just 6 corporate entities (AOL Time Warner, Viacom, Liberty Media, NBC, Disney, and News Corporation). Far from being an oasis of program source diversity, cable television's domination by big players makes it a mirror image of the anti-competitive marketplace in broadcast television. More significantly, five of these six corporations are the very same entities that dominate the program production market for broadcast television programming. Further, they often use their affiliated cable networks not for new programming, but to "repurpose" –i.e., repeat for profit – programs that their affiliated broadcast networks originally telecast.

Program Source Diversity Goal

We urge the Commission to maintain program source diversity as a distinct policy goal – and to proactively work to see it flourish again. To the extent that

[3] 2002 Biennial Regulatory Review, NPRM, par. 53.
[4] 2002 Biennial Regulatory Review, NPRM, par. 25.
[5] *Further Notice of Proposed Rulemaking*, adopted by the Commission September 12, 2001, at par. 46, especially footnote 102, and paragraph 58.

program source diversity has served as a proxy for viewpoint diversity, the public has been well served. We submit that the proper content neutral policy goal that the government can pursue is to ensure the maximum number of participants in the public square. We urge the Commission to find that a greater number of participants in the production of national television programs is a desirable policy goal on its face. Furthermore, we hope that the Commission will recognize that freer and more open competition serves the public at large.

In this regard, we note that the Commission has assembled a record in the related proceeding regarding national cable system ownership limits.[6] At the time of this filing deadline, the Commission has not issued a revised rule. The current ownership limit is 30% of cable homes; the now-merged AT&T Comcast reaches virtually that portion of the US cable homes. If the Commission raises the limit, it can be anticipated that AT&T Comcast and Time Warner Cable (currently the second-largest cable system owner with 15% of cable homes) will pursue the greatest ownership permitted. Assuming such ownership growth occurs, either one of these cable system owners would possess a life or death power over individual cable program services. Such power makes the policy goal of program source diversity all the more urgent. Only if a diversity of program suppliers is established "upstream" can consolidation "downstream" be tolerated. For that reason, we are filing these same comments in the cable ownership proceeding so that our concerns may be fully considered in that proceeding as well.

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[6] *Further Notice of Proposed Rulemaking*, adopted by the Commission September 12, 2001.

Nothing in *Schurz v. FCC*[7] is to the contrary. There the Court recognized that the "networks have no hope of proving to our satisfaction that the Commission is without any power to restrict the networks' participation in television programming."[8] While invalidating the Commission's attempt to restructure the then–existing financial interest and syndication rules, and also to restrict network in-house program production, the Court made clear that its decision was based on a failure by the Commission to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[9] Judge Posner was very specific about the Commission's authority in this area:

> "Even if we were persuaded that it would be irrational to impute to the networks even a smidgen of market power, the Commission could always take the position that it should carve out a portion of the production and distribution markets and protect them against the competition of the networks, in order to foster, albeit at a higher cost to advertisers and ultimately to consumers, a diversity of programming sources and outlets that might result in a greater variety of perspectives and imagined forms of life than the free market might provide. That would be a judgment within the Commission's power to make."[10]

We believe there is a clear connection between a rule limiting television and cable network in-house production and a diversity of programming. The data of the last decade makes apparent that five large corporate entities now control and exercise market power with respect to the choices available to the viewing public on

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[7] *Schurz Communications, Inc. v. FCC*, 982 F.2d (7th Cir. 1992)
[8] *Id.*, at 1043, 1049
[9] *Id.*, at 1049
[10] *Id.*

both broadcast television and cable networks. All decisions about ideas, program choices, financial terms and other indicia of television program development and ownership are controlled by these five entities. If the Commission has any doubt about this conclusion then it should hold public hearings where further evidence can be obtained by direct testimony from participants in the television production process.

But even on the record as it now exists before the Commission, the data is convincing that an essential component of the public interest standard, namely, a diverse range of sources of programs, is in imminent danger of extinction.

The Commission has acknowledged the Supreme Court finding that: "promoting the widespread dissemination of information from a multiplicity of sources" is a goal of the "highest order."[11] We submit that as outlet diversity disappears through mergers and acquisitions, stimulated by a relaxation of Commission rules designed to prevent such media concentration, then program source diversity must be assured by the Commission if a public interest goal of the "highest order" is to be maintained.

<u>The Proposed Program Source Diversity Rule</u>

In order to achieve the policy of a maximum number of program suppliers for broadcast and cable television, the Commission should adopt a program source diversity requirement. Such a rule would require that national program services on broadcast and cable television purchase at least 50% of their prime time

[11] 2002 Biennial Regulatory Review, NPRM, par. 21.

programming, measured quarterly, from independent producers. An independent producer is one not owned or controlled by or affiliated with the same entity owning or controlling the national program service. Newscasts and sports programs and telecasts of feature films would be excluded from the requirement. There would be no limitation on the ability of one network to purchase programming from another. Cable program services reaching less than 16 million cable homes would be excluded from the requirement.

The Need to Maintain the Dual Network Rule

The current Dual Network Rule is also an essential limitation on the market power of the largest television corporations. ABC, CBS, NBC and FOX occupy a distinct place in the distribution of television programming and consolidation of one of these networks with another would dramatically and immediately concentrate control of the national television marketplace to an unconscionable degree. Any relaxation of this rule would negatively affect not only the program production market that we have highlighted, but also would narrow control of the choice of programs scheduled, regardless of their production source.

Relevant Data

In its drive to relax the rules governing media ownership, the FCC released twelve studies. These studies have been criticized as incomplete, inconclusive, and relying on both flawed methodologies and researchers of questionable impartiality. For instance, Dean Baker, co-director of the Center for Economic Policy and

Research said, "The write-ups are often different from what they found. They were to a large extent poorly designed. The data they actually found showed there was a danger in consolidation."[12] Moreover, the studies do not even attempt to ask questions or delve seriously into the implications of media consolidation in the program supply market.

The only study the Commission has entered into the record regarding diversity of programs on Network Prime Time television is by Professor Mara Einstein. The conclusion of the study is that there exists a diversity of programs. The Study and its conclusions have been sharply criticized by the Caucus for Television Producers, Writers and Directors. See "A Response" filed by the Caucus with the Commission on December 20, 2002. We support the views expressed by the Caucus.

We observe only that the study defines diversity of programs in terms of diverse formats. Thus, an hour drama is distinct from a half-hour situation comedy, from a game show, or from a news magazine.[13] The Commission apparently accepts this analysis of genre as a measure of diversity of programs.[14] We submit that genre is an inappropriate measure of diversity of programs and is of no import in the current policy review. A situation comedy and an hour drama may, for instance, establish no diversity of viewpoint. Nothing inherent in the distinctions that separate the genres provides for any certain diversity of viewpoints.

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[12] Brooks Boliek, *Unions blast FCC's studies on media-ownership rules*, The Hollywood Reporter, December 19, 2002.
[13] Mara Einstein, FCC, *Program Diversity and the Program Selection Process on Broadcast Network Television*, October 1, 2002, p.7.
[14] 2002 Biennial Regulatory Review NPRM, par. 38.

We have several comments, as requested, on the Commission's data regarding the range of potential competitors in the media marketplace and the significance of that data for the biennial review.[15]

The Commission notes that over 60% of commercial television stations are affiliated with one of the top four networks.[16] This statistic alone justifies the Dual Network rule. No one entity should be permitted to control two of the four vital conduits into the nation's living rooms.

The Commission notes the availability of various audio services and newspapers and the Internet as substitute media for broadcast and cable television.[17] We disagree and urge the Commission to consider these as distinct media markets. They are not interchangeable with broadcast and cable television.[18] The television market is designed to supply moving audio-visual images to the viewing public and is therefore a unique experience for the viewing public, distinct from either audio-only services or newspapers. These media cannot be considered interchangeable with broadcast and cable television by their very natures. The markets must be considered separately. With regard to the Internet, we note that delivery of video is still in its infancy and cannot be considered a viable substitute for broadcast or cable delivery of television content at this time.

[15] 2002 Biennial Review NPRM, par. 23.
[16] 2002 Biennial Review NPRM, par. 24.
[17] 2002 Biennial Review NPRM, par. 26 and 27 and 28.
[18] 2002 Biennial Regulatory Review NPRM, par. 42.

Conclusion

The march of technological progress has not brought an increase in the number of voices with access to the American marketplace of ideas via television. The evidence is overwhelming that there has been a massive concentration of power in the hands of a few giant corporations who now control the vast bulk of programming in prime time both in broadcast and cable television. The Commission has a public interest obligation to ensure that television offers a real diversity of voices to the American public.

We urge the Commission to adopt a source diversity rule to ensure that the national program services on broadcast and cable television purchase at least 50% of their prime time programming from independent producers. We also urge the Commission to retain the Dual Network rule in its preset form. Finally, we submit that the Commission should hold public hearings at which all affected parties can be heard.

Respectfully Submitted,

Charles B. Slocum

Writers Guild of America, west,
Producers Guild of America,
Shukovsky English Productions,
John Wells Productions,
Bungalow 78 Entertainment,
Oh Shoot Productions,
Gideon Productions, and
UBU Productions

Competition and Diversity in the Broadcast and Cable Marketplace

> The media are the modern-day American Town Square, the place where people from different backgrounds and points of view share their stories and the public learns about the world. Here is where American democracy comes alive and the American identity is forged. But today, barriers have been erected to keep all but a handful of voices from being heard in our town square.
>
> Victoria Riskin, President
> Writers Guild- 2/28/03

As part of the Telecommunications Act of 1996, Congress required that the Federal Communications Commission (FCC) review the rules on broadcast ownership to determine "whether any such rules are necessary in the public interest as a result of competition." The FCC began proceedings in 2001 to review broadcast ownerships rules.

The Writers Guild of America, west opposes pending rule changes that would negatively impact American entertainment, 8,500 Guild members and the entire production marketplace. The Guild opposes the lifting of cable ownership caps and the Dual Network Rule that restricts one company form owning two national networks. The Guild supports the adoption of a rule to protect the interests of the American people by requiring diversity and open competition in the television marketplace.

More channels does not mean more choices

- Since 1992 the number of prime time shows produced by the major networks increased from 15% to 77%.
- Of the 230 cable programs services cited by the FCC as an example of diversity, only 91 reach enough homes to be considered "major" network and a full 80% are owned by 6 corporate entities; Viacom, Disney, News Corporation, General Electric, AOL Time Warner.

Diverse voices unheard and entrepreneurs are shut out

- Different political, ethnic and cultural views are significantly diminished as the number of producers, each with a unique point of view, disappears.
- Thousands of jobs have been lost in the entertainment industry as small and medium size entrepreneurs are squeezed out of business by consolidation.
- Fewer programming choices for children could be a result of further media deregulation according to prominent public health and media research organizations.

The Goal:

More voices in the important TV sector of Prime Time broadcast & cable.

Why:

The strength of our public dialogue rests on the ability of diverse and antagonistic ideas to compete for the public's attention.

The American ideal of such open debate rests not in the prerogative of a benign monopolist, but in the certainty of competition in the supply of content to the marketplace of ideas.

The Problem:

A multiplicity of sources of television programs must exist, but does not.

The Data:

Just One: Only one new series ordered for Fall 2002 by the six networks was produced by a company independent of the conglomerates and it was cancelled after two weeks (*Dinotopia* by Hallmark for ABC).

15% to 77%: The number of new "in-house" series on networks went from 15% (5 of 33) in 1992 to 77% (27 of 35) in 2002.

25 to 5: The number of independent producers for prime time has dropped from 25 in 1985 to 5 in 2002. (Per Coalition for Program Diversity Data)

500 is really 5: Cable's "500 Channel Universe" really amount to the top 91 cable channels (counting the broadcast networks, too) that reach a wide audience and 80% of these are owned by just six companies—Five are the *same ones* who produce 97% of prime time series!!

The Solution:

A Plurality of Sources: The legislation establishing authority for the FCC permits attention to be paid the number of sources for programs, but the FCC has focused on distribution as a place to regulate. They must shift their attention upstream.

We recommend a **plurality of sources requirement.**

50% of programs on a network must come from someone else.

Other Rules:

30% Cable System Limit: Cable System Owners Must be kept to the 30% of US TV Homes Limit

The Dual Network Rule must continue to keep the Big 4 Network under separate ownership.

http://www.calendarlive.com/cl-et-lowry10may10,0,1599897.story

TELEVISION

With networks on both sides of the table

As broadcasters prepare to unveil fall lineups, their penchant for producing much of what they air and playing financial hardball has raised concerns.

By Brian Lowry
Times Staff Writer

May 10 2003

As television's major players convene in New York next week for their annual star-studded presentations of fall prime-time schedules, one of the biggest dramas won't be in the lineup -- even though it features big money, rampant distrust and more than a hint of incest.

It's the story of the industry itself, which is going through economic convulsions as old financial models break down in what has been -- and in some ways remains -- a glamorous, free-spending business.

As a sign of how convoluted deal-making has become, when NBC agreed to pay $100 million a season to renew "Will & Grace" last year, representatives of the producers and director -- who share in the show's profits -- felt obliged to sit in. They questioned how truly adversarial the negotiations to secure a fair price would be when the exhibitor -- NBC -- and the supplier -- NBC Studios -- were part of the same corporate family, essentially switching money from one pocket into the other.

Such incestuous discussions are increasingly common in the industry, where a handful of giant companies occupy both sides of the negotiating table, produce much of the programming on the air and increasingly play financial hardball to offset their ratings losses.

The squeeze is being felt not just by talent but also by the agents and managers who represent them. With the dominant companies seemingly destined to concentrate their power even more if media ownership rules are further relaxed next month, veteran agent Bob Broder recently evoked Mafia imagery, only half-jokingly referring to them as "the five families."

Independent producers, meanwhile, have been pushed to near-extinction. Only 11% of last year's new prime-time programs came from companies other than major studios -- and most of those were low-cost reality shows.

All in all, these factors have fed a pervasive sense of anxiety in the TV business. Granted, the Hollywood trades still showcase plenty of seven-figure deals, but a slogan from "The X-Files" -- the macabre drama introduced a decade ago -- provides an increasingly timely mantra: "Trust no one."

Producers worry they're being shortchanged by broadcasters who want to own more of their programming, effectively acting as supplier and exhibitor. Studios have largely eliminated so-called "development deals" that they gave writers millions to dream up new series, saying they can no longer afford to pay someone to "sit around and read the trades." Less money is coming from selling programs abroad or peddling reruns to TV stations.

For those outside the business, the turmoil might seem just another case of Hollywood's haves griping about its have-mores -- or, as a pundit once described it, the rich versus the extremely wealthy. But some see far broader social implications because the same forces rattling the industry dictate who gains access to the airwaves and what kinds of shows get into America's living rooms.

Long-term implications

"If they don't do something about it now to give independents access to the four major networks, it's going to cause serious problems," said Ken Ziffren, an entertainment attorney representing the Coalition for Program Diversity, an alliance of producers (including Sony Pictures and Carsey-Werner-Mandabach), media buyers and Hollywood guilds asking the FCC to mandate setting aside 25% of prime time for independent producers.

Ziffren maintains that industry consolidation has hurt the public by leading to "derivativeness and blandness," with a handful of companies driven by short-term profit considerations controlling all facets of production.

Networks argue that they must hold down spending as their audience share diminishes, with the average viewer now receiving roughly 90 cable and broadcast channels as well as other forms of home entertainment. "The cost of generating a ratings point has gone through the roof," Mark Pedowitz, executive vice president of ABC Entertainment Television Group, said at a recent forum on media ownership, noting that production costs can't keep rising while ratings fall. The new deals, he added, "reflect those underlying economics." Pedowitz also accused creative people lamenting the shift of engaging in "a lazy and forgetful nostalgia for the golden age of television."

Protections unlikely

With the commission headed by Republican-appointed FCC Chairman Michael Powell, few expect it to introduce more regulatory safeguards; still, the push highlights growing fear among the dwindling ranks of program suppliers who lack a network affiliation -- even Sony, which is barred from owning a broadcast network because of its foreign ownership.

The roots of this dispute date to the elimination of the "financial interest and syndication" rules, federal guidelines that severely limited the ownership stake networks could have in programs they air. Removal of the rules cleared the way for a series of studio-network mergers in the mid-1990s.

By the time the dust settled, there were five networks -- CBS, ABC, Fox, WB and UPN -- aligned with studios, and NBC, which has vast resources as part of General Electric.

By last fall, more than three-quarters of new prime-time programs were produced by a company affiliated with the network broadcasting them. A decade ago, that number stood at just 18%. Yet while networks are interested in taking a share of revenue from hits such as CBS' "Everybody Loves Raymond," an equally pressing issue is controlling the price of success.

Increasingly, networks are wielding a contractual weapon called "perpetual license fees." Wounded by the millions paid in the past to producers of

hits such as "Roseanne" and "ER," they are trying to build in fixed raises for the life of new series, so they won't be held hostage trying to hang on to hit shows after four or five seasons.

"They've limited the upside for creative talent," said Chris Silbermann, a partner in the literary agency Broder Webb Chervin Silbermann. "They've taken anything that might have been a home run and made it into a double."

A wake-up call for the networks came in 1998, when the NBC drama "ER" came up for renewal. With the network losing "Seinfeld" and the National Football League that year, producer Warner Bros. possessed ample leverage and secured an unprecedented $850-million agreement paying $13 million per episode. At the time, then-Warner Bros. Chairman Robert Daly said he "would have moved the show in a flash" had NBC not met its asking price.

As networks own shows and occupy both sides of the bargaining table, such scenarios have become less common, absent the threat of another network bidding to take away a series at renewal time.

Network officials point out that studios aren't as willing these days to foot the bill for programming because network license fees cover less of series budgets, making the networks' role as financier necessary.

Risks are greater

By backing shows, networks gamble millions in pursuit of elusive hits, at a time when the long odds make prime time no place for the fainthearted. Disney, for example lost millions last year on "Push, Nevada," an interactive drama the studio produced for ABC, with actor Ben Affleck among its producers. It failed to attract viewers despite a $1-million prize for solving the show's mystery.

"For everyone who wants more voices, where is that financing going to come from?" asked NBC Studios President Ted Harbert. "The price tag is extremely high."

In addition, the so-called "back end" for shows -- what they make when the reruns are sold to TV stations or cable networks -- has withered, and producers are reaping less from the sale of U.S. programming abroad, where home-grown productions are in vogue. Studios were once assured a big payday if a series ran five years, providing at least 100 episodes to repeat in perpetuity. Today, however, even some long-running shows are enduring what one industry veteran called "the 'Evening Shade' nightmare," referring to the Burt Reynolds comedy. Although the 1990-94 show performed well on CBS, no one was interested in buying the repeats, meaning each new half-hour simply added to production deficits the studios had little chance of recouping. Current shows, such as the Ted Danson comedy "Becker," face a similar dilemma.

Industry sources say part of the problem is the market power wielded by Tribune Co. (owner of the Los Angeles Times, as well as 26 TV stations) and particularly Fox. Both own TV station groups in major cities that air programs like "Frasier" and "The Simpsons" before and after prime time. With only two major buyers, the negotiating leverage -- especially for more marginal programs -- has shifted to stations, tamping down prices.

In the past, said former NBC Chairman Grant Tinker, "you were lucky if you succeeded and your show made it to syndication. Now, even in success you may not succeed."

Some good news

Amid all the bleakness, some do see room for optimism. After an economic

downturn and further concerns in the wake of the Sept. 11 attacks, this season's advertising market has been surprisingly robust, and forecasters expect so-called "upfront" commitments after the sessions next week in New York to exceed $8.5 billion for next season.

The proliferation of shows like "The Bachelor," which don't have much shelf life, also could heighten demand for scripted series. "Reality TV is creating a problem in that there's a lack of scripted shows in the pipeline," said manager-producer Eric Gold, whose clients include Damon Wayans of ABC's "My Wife and Kids."

Networks stress that they remain open to outside suppliers, echoing former NBC West Coast President Don Ohlmeyer, who often said he would "take a hit from Attila the Hun."

Still, Ohlmeyer -- who put on such NBC-produced hits as "Will & Grace" and "Providence" during his tenure -- said production makes sense for a network only if it is targeted, selective and the shows air in time slots where they have the best chance of succeeding. "You never wanted to own more than a third of your schedule ... because 80% to 90% of new shows fail," he said. "It's a double-edged sword."

The bottom line, one broadcasting executive said on condition of anonymity, is that the television world has changed and those accustomed to its past largesse must adapt to it. "They want life to be the way it's always been," he said. "That life is not economically possible."

Returning Oligopoly of Media Content Threatens Cable's Power

Tom Wolzien
Mark Mackenzie

- Early signs suggest classic content oligopoly may be re-emerging
- Five or fewer programmers may leverage local/national content versus big cable

The Long View

Returning Oligopoly of Media Content Threatens Cable's Power

Overview

Common wisdom these days has the consolidated cable companies, particularly Comcast, taking a commanding lead in the age-old leverage battle with programmers. Supposedly this will give cable free rein to drive down prices paid for content. On the contrary, a strong programming oligopoly is beginning to re-emerge. This is permitting a three-pronged pincer movement that combines a surprising growth in control of national content with consolidated cable's unintentional increase in its exposure to powerful local retransmission consent requirements. The growth in content power will be additionally enabled by new consumer hardware and high-speed networks to the home. Comcast ($25) now must gain retransmission agreements covering 55 stations owned and operated by the largest programmers, who, together with AOL, controlled more than 70% of the prime-time viewing in December. This number would increase to 85% if independent and joint-venture services are consolidated with the big five — a likely event over the next few years as weaker cable networks are hammered on price. At that point, five programming giants would split roughly the same number of rating points controlled by ABC, CBS and NBC during television's "golden age." Additionally, the introduction of in-home networks and servers, coupled with the evolution of unbundled routes for content into the home, suggest that the implication of these changes may go far beyond the price paid to programmers. Going forward, the programmers' power threatens cable's ability to maintain the value of its "bundle" and eventually may shift it to "dumb pipe" status, devoid of the upside from intellectual property.

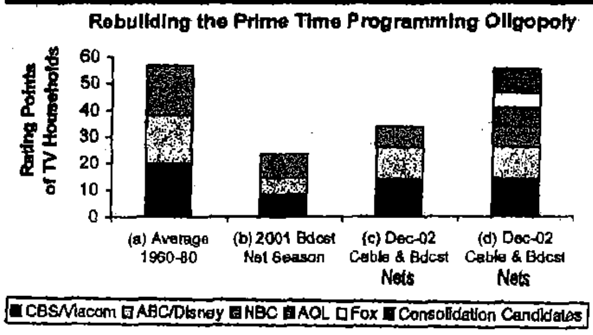
Part I: Programming Power Grows

The subject of this *Long View* is leverage — whether content or distribution can get an edge on one another going forward and, if content can get an edge, does that threaten cable's historic ability to bundle content and transport at a high-margin markup. Our view is that big-content is slowly gaining an edge, even as cable consolidates. That edge comes from a combination of local and national distribution and from evolution in the consumer electronics area.

Programming Oligopoly Reforming: A study of the December ratings from Nielsen Media suggests that we are beginning to see a rebuilding of the old programming oligopoly when cable and broadcast network and station viewing are considered. In December, Viacom ($37) controlled about 22% of prime-time viewing through its broadcast and cable networks. Disney ($17) controlled 18%, while News Corp. ($25), NBC and AOL ($10) were each in the 10-12% range. Together, the five companies controlled about a 75% share of prime-time viewing, not including their nonconsolidated partnerships like A&E, Court TV and Comedy Central.

Exhibit 1 shows what we found to be a major disconnect, at least for us, in perception and reality. Column (a) shows classic prime-time viewership during television's "golden age," when three networks split an average of 57% of the television households (ratings). Last season ABC, CBS and NBC split about 23%, as seen in column (b). But if the viewing of all properties owned by the parent companies — Disney, NBC and Viacom — is totaled, those companies now directly control television sets in over a third of the TV households. Add AOL, Fox and networks likely to see consolidation over the next few years (Discovery, A&E, EW Scripps, etc.), and five companies or fewer would control roughly the same percentage of TV households in prime time as the three nets did 40 years ago. The programming oligopoly appears to be in a process of rebirth.

Exhibit 1 Programming Oligopoly Returning



Source: Bernstein analysis of Nielsen Media data.

Increased Retrans Exposure: In another surprising twist, the consolidation of the cable industry has actually left the largest cable company, Comcast, more exposed to the leverage of the largest programmers, as their local television stations can further exploit the need for the cable company to gain permission to retransmit the local signals. *The math resulting from consolidation is working against Comcast.* In 23 of the top 26 television markets covering half the population of the United States, Comcast now must gain retransmission consent for some 62 separate television stations owned by four of the top five program companies. Of the top 26 markets, only Houston, Phoenix and Portland, Oregon, currently don't have an overlap of Comcast with ABC/Disney, CBS/Viacom, Fox/News Corp. and/or NBC/GE. Exhibit 2 shows the programmers' big market leverage against Comcast.

Comcast's historic approach has been to avoid high-profile conflicts. Just how high-profile retransmission consent conflicts can be is recalled from 2000 when then Time Warner Cable took the ABC stations off in New York and other major markets for a day before the company was crucified in Washington and other media. The lesson: the more exposed cable companies are to high-quality local television stations owned by the major programmers, the more leverage those programmers have against cable. And Comcast is now the most exposed of all, even before taking into account what News Corp. might do with retransmission permission for its Fox stations should it enter the satellite business.

This overlap means that the programmers other than AOL probably now have sufficient control over Comcast through retransmission consent requirements for major stations to: (a) neutralize

Exhibit 2 **Comcast's Retransmission Challenge**

DMA[1] #	DMA	AOL	Disney	Viacom	Fox	GE	Top 26 O&Os Stations	Retrans Needed Now	CMCSA	AT&T	Comcast Subs (000)	T Subs (000)	Subs (000)
1	New York, NY		WABC	WCBS	WNYW/ WWOR	WNBC	5	5	x		670		670
2	Los Angeles, CA		KABC	KCBS/ KCAL	KTTV/ KCOP	KNBC	6	6		x		530	530
3	Chicago, IL		WLS	WBBM	WFLD	WMAQ	4	4		x		1,750	1,750
4	Philadelphia, PA		WPVI	KYW/ WPSG	WTXF	WCAU	5	5	x		1,790		1,790
5	San Francisco/Oakland/ San Jose, CA		KGO	KPIX/ KBHK		KNTV	4	4		x		1,830	1,830
6	Boston, MA			WBZ/ WSBK	WFXT		3	3		x		1,680	1,680
7	Dallas/Fort Worth, TX			KTVT / KTXA	KDFW/ KDFI	KXAS	5	5		x		560	560
8	Washington, DC				WTTG/ WDCA	WRC	3	3	x		860		860
9	Atlanta, GA			WUPA	WAGA		2	2	x		680		680
10	Detroit, MI			WWJ/ WKBD	WJBK		3	3	x		830		830
11	Houston, TX		KTRK		KRIV/ KTXH		3						-
12	Seattle/Tacoma, WA			KSTW			1	1		x		960	960
13	Tampa/St. Petersburg/ Sarasota, FL			WTOG	WTVT		2	2	x		210		210
14	Minneapolis/St. Paul, MN			WCCO	KMSP/ WFTC		3	3		x		340	340
15	Cleveland, OH				WJW		1	1		x		90	90
16	Phoenix, AZ				KUTP/ KSAZ		2						-
17	Miami/Ft. Lauderdale, FL			WFOR/ WBFS		WTVJ	3	3		x		780	780
18	Denver, CO			KCNC	KDVR		2	2		x		620	620
19	Sacramento/Stockton/ Modesto, CA			KMAX			1	1		x		550	550
20	Orlando/Daytona Beach/Melbourne, FL				WRBW/ WOFL		2	2	x		58		58
21	Pittsburgh, PA			KDKA/ WNPA			2	2		x		620	620
22	St. Louis, MO				KTVI		1	1		x		5	5
23	Portland, OR						0	0		x		485	485
24	Baltimore, MD			WJZ	WUTB		2	2		x	599		599
25	Indianapolis, IN			WNDY			1	1		x	197		197
26	San Diego, CA					WRC	1	1		x		29	29
	Total – 24 CMCSA Mkts	0	6	26	26	9	67	62	7	17	5,894	10,830	16,724

1 Designated Metropolitan Area.

Source: Corporate reports and Nielsen Media.